NO. 2 2097

IN THE UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

EARL JOSEPH OLIVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTION

This is an appeal from an order of the United States District Court for the Central District of California, entered June 9, 1967, denying appellant's motion to vacate and set aside his sentence, judgment and indictment under the provisions of Title 28, United States Code, Section 2255.

The jurisdiction of the District Court rested on Title 18, United States Code, Sections 2113(a) and (d), and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's "2255 Motion", pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

Title 28, United States Code, Section 2255 provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of

the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." (Emphasis supplied).

III

STATEMENT OF THE CASE

On May 20, 1964, a three count indictment was returned by the Grand Jury for the Southern District of California, Crim. No. 33678, [1] charging the appellant and two other co-defendants with robbery of a National Bank with the use of a dangerous weapon and device in violation of Title 18, United States Code, Sections 2113(a) and (d).

On June 15, 1964, the appellant represented by Court appointed counsel, Mr. Morris Lavine, entered a plea of not guilty to the charges of the indictment. Between June 15, 1964 and September 1, 1964, Mr. Arthur Garrett, was substituted as retained counsel for appellant.

On September 1, 1964, the appellant withdrew his plea of not guilty to Count Three of the indictment and entered a plea of guilty to that single count. On September 20, 1964, the appellant and retained counsel, Mr. Garrett, appeared for sentencing of the appellant. On that date the Honorable Harry W. Westover sentenced the appellant to the custody of the Attorney General for a period of twenty-five years.

On May 9, 1966, the appellant filed his first "2255" motion alleging among various errors that "the plea of guilty was not

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1/ By letter on August 9, 1967, Mr. Carl Brink, Motions Clerk, U. S. Court of Appeals for the Ninth Circuit, requested that the entire District Court file No. 33678 be forwarded to the Court of Appeals by the United States District Court.

voluntarily made but a product of sentence choice". The appellant continued by charging that his plea of guilty was the product of duress, coercion, physiological pressure, bargaining, and promise of sentence under the "new law". At no time amongst the numerous errors alleged did the appellant claim or infer that he was not competent during the proceedings [Civil No. 66-783-HW].

On May 25, 1966, the District Court, incorporating a lengthy opinion prepared in connection with a motion for rehearing in which appellant raised the same contention, denied the "2255" motion (District Court File No. 66-783-HW, ancillary to #33678 Crim. Order denying motion, and order denying Petition for Writ of Error Coram Nobis). The District Court stated, with respect to appellant's claim of certain promises made by counsel:

> "Each defendant retained counsel. Defendant Oliver first represented by appointed counsel, Morris Lavine, Esquire, engaged Arthur Garrett, Esquire. Each is a practitioner skilled in the field of criminal law. At all stages of the proceedings, one or the other of these two lawyers represented defendant Oliver. . . ."

The court continued by stating:

> "Mr. Morris Lavine is, as stated above, a veteran practitioner before all the counts - State and Federal. He has represented many, many clients charged with criminal acts. Mr. Garrett is also no

novice in the practice of criminal law.

> "What promise of leniency could Mr. Lavine or Mr. Garrett have made to a client caught at the scene of the robbery, blood dripping from a hand wounded when he resisted arresting officers with a gun?"

(District Court File No. 33677-CD ordering denying Petition for Rehearing and denying motion for modification of sentence, dated October 26, 1964.)

The District Court in its opinion also quoted portions of the appellant's signed petition to be permitted to enter a plea of guilty to Count Three of the indictment in which appellant stated:

> "[8] I declare that no officer or agent of any branch of the Government (Federal, State, or local), nor any other person, has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive a lighter sentence, or probation, or any other form of leniency, if I would plead 'guilty' . . . ." (emphasis added by District Court).

On August 2, 1966, the Court of Appeals denied leave to appeal in forma pauperis, stating:

> "The motion is denied as legally frivolous for the reasons expressed by Judge Westover in the above order." (Misc. 2858).

On September 15, 1960, appellant filed a petition for writ of certiorari which was denied on January 9, 1967.

On March 24, 1967, the appellant filed the instant "2255" motion in which he alleged:

(1) That he was mentally incompetent at the time of the alleged offense and at all times thereafter, and,

(2) That the plea of guilty was not voluntary but induced by certain promises of court appointed and retained counsel [C. T. pp. 2-15].

On June 9, 1967, the District Court denied the motion and in its order stated:

"In the current pleading he raises for the first time the assertion that he was mentally ill at the time of entering his plea of guilty. The records and files firmly and conclusively negate his contention.

"The second and remaining ground upon which he attempts to allege his sentence as invalid is that his guilty plea was involuntary and the product of intimidation and based upon a false promise that he would receive a sentence 'not to exceed (10) years.'

"This issue is res judicata by virtue of this Court's order of October 26, 1964, and the order dated May 25, 1966. . . ." [C. T. p. 20].

It is from this denial of that motion that the present appeal arises.

IV

ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT'S BELATED CLAIM OF MENTAL INCOMPETENCY.

The appellant after filing one Petition for Rehearing and modification of sentence, one prior "2255" motion and waiting two and one-half years after imposition of sentence raises for the first time his alleged mental incompetency to enter a plea to the charges against him.

Although a lapse of time in asserting an alleged error in a motion for post conviction relief is not controlling - it is appropriate in considering the good faith and credibility of the petitioner.

La Clair v. United States (U.S. D.C. N.D. Ind.), 241 F. Supp. 819, 824 (1965);

Rakes v. United States (U.S. D.C. W.D. Va.), 231 F. Supp. 812 (1964).

Although appellant has urged a variety of errors in prior petitions and motions in an effort to overturn his conviction, no prior claimed error has been made in any pleadings raising his mental incompetency.

Now that appellant does raise this issue he merely makes

the bold assertion that he was mentally ill and incompetent. No detailed specifications of fact are made in the petition and no probative facts are alleged in support of the general conclusionary allegation.

A careful reading of appellant's argument reflects that the import of appellant's alleged grievance is not really that he was mentally incompetent but rather that he was not sentenced under the provision of Title 18, United States Code, Section 4208(b) for a study and thereafter receive a sentence of no more than 10 years.

The appellant places great weight on the fact that three weeks after his plea of guilty was entered and at the time of sentencing, his retained attorney urged the Court to sentence the appellant for a study under Title 18, United States Code, Section 4208(b), and that when appellant addressed the court at that time he requested that he be sent some place for a psychiatric examination "because I think I need it."

This single statement made at the time of sentencing when viewed in the light of the following factors is hardly sufficient to warrant an evidentiary hearing on the claim; that the appellant at all times was represented by extremely qualified and experienced trial counsel, Mr. Morris Lavine and Mr. Arthur Garrett, who made no pretrial motion for a psychiatric examination of appellant; that appellant appeared in court on four occasions prior to entering a plea of guilty with counsel and at no time indicated to the court or apparently to counsel any factor which would raise the question of appellant's compentency to stand trial; that on June 15, 1964,

the appellant requested the court to allow him to withdraw his not guilty plea and enter a plea of guilty and again made no mention of any incapacity to enter the plea; that between the entry of the plea of guilty and time of sentence appellant was interviewed by a representative of the United States Probation office and although appellant was questioned as to his health, no mention was made by him as to any mental disability, nor was any bizzare conduct or telltale signs of mental illness reflected by the probation officer to have been observed. On the contrary, the probation report did state that "there are no indications of any emotional imbalance in the family background" (District Court File No. 33678: Probation Report].

Thus, the only evidence the District Court was left with was the unsupported statement made by appellant. Even now the appellant has failed to offer proof to support his claim such as medical records of the Bureau of Prisons, which have been relied upon in similar petitions, to give verity to the statements.

The provisions of Title 18, United States Code, Section 4208(b) are not designed as a method of determining the competency of a defendant, but rather is a post-conviction procedure to obtain "detailed information as a basis for determining the sentence to be imposed." Thus, the mere suggestion that it be utilized does not raise an issue of sanity to be determined by the court.

Therefore, in view of the foregoing the District Court did not err in finding that "the records and files firmly and conclusively negate this contention" that appellant was mentally ill at the time

of entering his plea of guilty.

B. THE DISTRICT COURT IS NOT REQUIRED TO ENTERTAIN A SECOND OR SUCCESSIVE MOTION BASED SUBSTANTIALLY ON THE SAME GROUNDS AS THE EARLIER MOTION.

Where the second or successive application under Title 28, United States Code, Section 2255, is shown conclusively on the basis of the application, files, and records of the case alone, to be without merit, the application should be denied without a hearing.

Sanders v. United States, 373 U.S. 1, 15 (1962).

The court recognized that controlling weight may be given to denial of a prior application for Section 2255 relief if (1) the same grounds presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent applications.

Sanders v. United States, supra.

1. The Same Ground Presented in the Instant Application Was Determined Adversely to Appellant in the Prior Application.

On September 21, 1964, appellant was sentenced. Shortly thereafter appellant filed a three page handwritten pleading alleging

that his plea was induced promises made by counsel Lavine and Garrett. In an eight page order filed October 26, 1964, the District Court treated the pleading as a petition for rehearing and for modification of sentence, considered, analyzed and denied appellant's claim.

On May 9, 1966, the appellant filed his first "2255" motion again alleging the identical error as urged in the earlier pleading namely, that "the plea of guilty was not voluntarily made, but a product of sentence choice; . . . . " On May 25, 1966, the District Court denied appellant's motion noting that this question had been considered by the Court in appellant's "Petition for Rehearing" as reflected by its order dated October 26, 1964.

Finally, in the instant "2255" petition the appellant again reiterates the same contention that his plea of guilty was the product of promises from counsel.

The foregoing leaves little doubt that the "grounds" for relief asserted by appellant in the instant proceedings were considered by the District Court and determined adversely to appellant.

2. The Prior Determination Was On the Merits.

The Supreme Court in Sanders, supra, at 16, in defining "adjudication on the merits", stated that a denial on the basis of the files and records "is sufficient to conclusively resolve the issue on

their merits."

The lengthy opinion and order rendered in this case denying appellant "Petition for Rehearing" dated October 26, 1964, and incorporated as part of the order denying appellant's first "2255" motion filed May 25, 1966, reflect a thorough review of the proceedings. In conclusion, the District Court stated "the record and files relating to Earl Joseph Oliver conclusively show there is no merit in the allegations . . .".

The Court of Appeals in denying appellant's petition to appeal in forma pauperis from the District Court's order dated May 25, 1966, also recognized the lack of merit in appellant's claim stating:

> "The motion is denied as legally frivolous for the reasons expressed by Judge Westover in the above order."

3. The "Ends of Justice" Would Not Be Served By Repeated Review of This Issue.

No new evidence supporting appellant's contention has been presented in the instant petition that was not available and considered by the District Court in reaching its initial decision on October 26, 1964 and again on May 25, 1966. There is no basis for relitigating an issue described as "legally frivolous" by this Court.

V

CONCLUSION

The trial court ruled correctly in denying the instant motion without a hearing upon properly finding that the files and records conclusively negate the contentions that appellant was mentally ill at the time of entry of plea, and that appellant's claim of promises by counsel had previously been determined in an earlier "2255" motion.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Robert M. Talcott

ROBERT M. TALCOTT